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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Were the death sentences imposed in these cases pursuant to Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Section 412 to 414, which mandates the sentence of death unless the defendant proves by a preponderance of the evidence that mitigating circumstances outweigh aggravating circumstances, imposed in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?

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PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

Petitioners, Richard Danny Tichnell, and James Arthur Calhoun, pray that a writ of certiorari issue to review the judgments of the Court of Appeals of Maryland entered in these proceedings.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland affirming the death sentence of Petitioner Tichnell is included as Appendix C. It is reported at 297 Md. 432, 468 A.2d. 1 (1983). Prior opinions of the Court of Appeals in the Tichnell case, reported at 287 Md. 695, 415 A.2d 830 (1980) and 290 Md. 43, 427 A.2d 991 (1981), are included as Appendices A and B, respectively. The opinion of the Court

of Appeals of Maryland in the case of Petitioner Calhoun is included as Appendix F. It is reported at 297 Md. 563, 466 A.2d 45 (1983).

JURISDICTION

The opinion of the Court of Appeals of Maryland affirming the sentences of death were filed in the case of Petitioner Tichnell on November 3, 1983 and in the case of Petitioner Calhoun on November 21, 1983. Motions for rehearing were denied in both cases on December 5, 1983. (Appendices D and G). On January 25, 1984, Chief Justice Burger signed orders in both cases extending the time within which to file a petition for writ of certiorari to and including March 4, 1984. (Appendices E and H). Pursuant to Supreme Court Rule 19.4, Petitioners file herewith a consolidated petition for writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

United States Constitution, Amendment XIV, provides in pertinent part:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS AND RULES INVOLVED

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Secs. 412-414 provides:

> Section 412. Punishment for murder.
>
> (a) Designation of degree by court or jury. -- If a person is found guilty of murder, the court or jury that determined the person's guilt shall

state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with Sec. 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

Section 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. -- This proceeding shall be conducted:

(1) Before the jury that determined the defendant guilty; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined by defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions. -- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g);

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or please, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible in other sentencing procedures;

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or (h).

(d) Consideration of aggravating circumstances. -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of Section 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.

(e) Definitions. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person," except as those terms appear in subsection (d)(7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in Section 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a

charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

Section 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the Court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not imposition of the sentence of death is justified in the case.

(c) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e) Considerations by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's findings of a statutory aggravating circumstance under Section 413(d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:

(i) Affirm the sentence;

(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under Section 413; or

(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The Court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

Maryland Rules of Procedure

Rule 772A. Sentencing -- Procedure in Capital Cases.

a. Scope.

This rule applies to all cases for which sentences are imposed under Code, Article 27, Section 413.

b. Statutory Sentencing Procedure.

If a defendant has been found guilty of murder in the first degree, and if the State has given the notice required under Code, Article 27, Section 412(b), a

separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, Section 413.

c. Judge.

Except as provided in Rule 750, the judge who presides at trial shall preside at the sentencing proceeding.

d. Written Findings and Determinations.

The findings and determinations shall be made in writing in the following form:

(Caption)
FINDINGS AND SENTENCING DETERMINATION
Section I

Based upon the evidence we unanimously find that each of the following aggravating circumstances which is marked "yes" has been proven BEYOND A REASONABLE DOUBT and each aggravating circumstance which is marked "no" has not been proven BEYOND A REASONABLE DOUBT:

1. The victim was a law enforcement officer who was murdered while in the performance of his duties.
___ Yes ___ No

2. The defendant committed the murder at a time when he was confined in a correctional institution.
___ Yes ___ No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
___ Yes ___ No

4. The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
___ Yes ___ No

5. The victim was a child abducted in violation of Code, Article 27, Section 2.
___ Yes ___ No

6. The defendant committed the murder pursuant to an agreement to contract for remuneration or the promise of remuneration to commit the murder.
___ Yes ___ No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.
___ Yes ___ No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

___ Yes ___ No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

___ Yes ___ No

10. The defendant committed the murder while committing or attempting to commit robbery, arson or rape or sexual offense in the first degree.

___ Yes ___ No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete Sections II and III.)

Section II

Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked "no" has not been proven by A PREPONDERANCE OF THE EVIDENCE:

1. The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

___ Yes ___ No

3. The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

___ Yes ___ No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

___ Yes ___ No

5. The youthful age of the defendant at the time of the crime.

___ Yes ___ No

6. The act of the defendant was not the sole proximate cause of the victim's death.

___ Yes ___ No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

___ Yes ___ No

8. Other mitigating circumstances exist, as set forth below:

___ Yes ___ No

_____

_____

_____

(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "yes", complete Section III. If all of the above in Section II are marked "no", you do not complete Section III.)

Section III

Based on the evidence we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

___ Yes ___ No

DETERMINATION OF SENTENCE

ENTER THE DETERMINATION SENTENCE EITHER "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no" enter "Life Imprisonment".
2. If Section III was completed and was marked "yes" enter "Life Imprisonment".
3. If Section II was completed and all of the answers were marked "no" then enter "death".
4. If Section III was completed and was marked "no" enter "Death".

We unanimously determine the sentence to be _____

_____ Foreman	_____ Juror 7
_____ Juror 2	_____ Juror 8
_____ Juror 3	_____ Juror 9
_____ Juror 4	_____ Juror 10

Juror 5	Juror 11
Juror 6	Juror 12

or, _____
JUDGE

e. Advice of the Judge.

Immediately after imposing sentence, the judge shall advise the defendant of the right to file an appeal and the time within which the defendant must exercise this right. The judge shall also advise a defendant who receives a sentence of death that (1) only his sentence will be automatically reviewed by the Court of Appeals, an (2) the sentence will be stayed pending a review of the sentence by the Court of Appeals and any appeal he may take.

f. Report of Judge.

When the judgment becomes final, the judge promptly shall prepare and send to the parties a report in the following form.

(Caption)
REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
   - A. Date of Birth
   - B. Sex
   - C. Race
   - D. Address
   - E. Length of Time in Community
   - F. Reputation in Community
   - G. Family Situation and Background
     1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
     2. Family history (describe family history including pertinent data about parents and siblings)
   - H. Education
   - I. Work Record
   - J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
   - K. Military History
   - L. Pertinent Physical or Mental Characteristics or History
   - M. Other Significant Data About Defendant

II. Data Concerning Offense
   - A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
   - B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so, describe.

C. Did the defendant know the victim prior to the offense?
Yes ___ No ___
1. If so, describe relationship
2. Did the prior relationship; in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time of community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty ____; guilty ____; not guilty by reason of insanity ____

B. Election of Mode of Trial:
Court ____ Jury ____
If a jury trial was elected, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity--Did defendant request a mistrial or a change of venue on the basis of publicity? If so explain. Attach copies of any motion made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which state relied in the pretrial notice.

B. Election of court or jury--Was the proceeding conducted before same judge as trial _____
before same jury _____
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so explain.

C. Counsel--If counsel at sentencing was different from trial counsel, give information requested III. C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence --began and ended
Post-trail Motions Disposed of
Sentencing Proceeding--began and ended
Sentence Imposed

VI. Recomendation of Trial Court As to Whether Imposition of Sentence of Death Is Justified.

VII. A copy of the Findings and Sentencing Determination made in this case is attached to and made a part of this report.

Judge

CERTIFICATION

I certify that on the _____ day of _____, 19 ____, I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning factual accuracy of the report. The judge promptly shall file his final report and any comments of the parties with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals.

STATEMENT OF THE CASE

On January 18, 1979, Petitioner Richard Danny Tichnell was charged by indictment in the Circuit Court for Garrett County, Maryland with the first degree murder of David G. Livengood. On May 4, 1979, the State's Attorney for Garrett County filed notice pursuant to Maryland Code (1957, 1982 Repl. Vol.) Article 412(b) of the State's intention to seek the penalty of death. On Petitioner's motion for charge of venue, the prosecution was removed to Wicomico County, Maryland.

The evidence at trial disclosed that early on the morning of January 18, 1979, Petitioner Tichnell and a codefendant broke into a store and triggered a silent alarm. Deputy Sheriff David Livengood responded to the alarm and, in the course of attempting to arrest Petitioner and the codefendant, was shot seven times by petitioner and killed. Petitioner was himself shot by Livengood. The jury convicted Petitioner Tichnell of first degree murder, storehouse breaking, and robbery with a deadly weapon.

Petitioner Tichnell waived sentencing by the jury and pursuant to Maryland Code (1957, 1982 repl. vol.) Art. 27, Se. 413(b)(3) elected to be sentenced by the court. After a hearing, the court determined pursuant to the statutory formula, Art. 27, Sec. 413(d) to (h) that the two statutory aggravating factors[1] found to exist beyond a reasonable doubt were not, by a preponderance of the evidence, outweighed by the single mitigating factor found to exist by a preponderance of the evidence[2], and accordingly imposed a sentence of death on the murder count.

On automatic appeal to the Court of Appeals of Maryland pursuant to Article 27, Sec. 414, Petitioner Tichnell, joined by the Maryland Office of the Public Defender as amicus curiae, contended that the Maryland Capital punishment statute was invalid under the Eighth and Fourteenth Amendments of the United States Constitution. The

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[1]Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413(d) sets forth an exclusive list of ten aggravating circumstances. The circumstances found in Petitioner Tichnell's casewere that the victim was a law enforcement officer murdered in the performance of his duties (Sec. 413(d)) and that the murder was committed in furtherance of an escape from the lawful custody of a law enforcement officer (Sec. 413(d)(3)).

[2]The mitigating circumstance found by a preponderance was that Petitioner had not previously been found guilty of a crime of violence. Sec. 413(g)(1).

Court affirmed the murder conviction and upheld the statute against the Federal constitutional challenge, ruling that the statute was not impermissibly mandatory and "withstands scrutiny under Woodson v. North Carolina [428 U.S. 280 (1976)]," Tichnell v. State, 287 Md. 695, 728, 415 A.2d 830 (1980) nor constitutionally defective by reason of the standards of proof required by the statute and its allocation of the burdens of proof respecting the existence of mitigating circumstances and the balancing of mitigating and aggravating circumstances. Id. at 729-734. The Court vacated the death sentence however, on finding that it had been imposed under the influence of an "arbitary factor" in violation of Sec. 414(e)(1). Id. at 743-44.

Petitioner Tichnell then elected pursuant to Art. 27, Sec. 413(b)(iv) that resentencing be before a jury, which found the existence of the same two aggravating factors beyond a reasonable doubt. The jury also found by a preponderance of the evidence that Petitioner had not previously been convicted of a crime of violence, that he acted under substantial duress, domination or provocation of another person and that it was unlikely that Petitioner would engage in further criminal activity that would constitute a continuing threat to society. The jury did not find, however, that those mitigating circumstances were proven by a preponderance of the evidence to outweigh the aggravating circumstances, and a sentence of death was accordingly imposed. On appeal, the Court of Appeals again vacated the sentence on evidentiary grounds. Tichnell v. State, 290 Md. 43, 427 A.2d. 991 (1981).

Petitioner again elected to be sentenced by a jury. In instructing the jury, the Court referred them to the sentencing form required by Maryland Rule 772A.

> [A]fter you have completed Section One and Two of this form you the, assuming you have at least one "Yes" in the aggravating side, you are going to have one in the Mitigating side because I already instructed you to have one, right, you have to then engage in the process of balancing against the aggravating factors and circumstances the mitigating circumstances that you have found, and you are here answering the question posed in Section Three of this form [3] before you which is based upon the evidence, do the mitigating circumstances marked yes outweigh the aggravating circumstances marked yes. That is the section to outweigh Section One. And you answer that yes or no, and that is the critical question you have to answer because based upon your answer to that question the remainder of the form becomes a matter of simply filling it out.
>
> If the answer to question number three is "Yes" then the Sentence which you will impose is Life. If the answer to the question is "No", then the Sentence to be imposed is Death ... [Proceedings of January 20, 1982, pp. 165-66].

The jury found one mitigating circumstance--that Petitioner had not been previously convicted of a crime of violence--but did not find that that circumstance was proven by a preponderance of the evidence to outweigh the aggravating circumstance, and accordingly imposed a sentence of death.

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[3]The sentencing form explained that the preponderance of the evidence standard applied to this weighing. The court explained the term as follows:

> "[P]reponderance of the evidence" simply means that when you take the entire evidence presented, whether it was presented by the State or by the defense, and you weigh it in your mind, evaluate it with the -- to made the determination, "is this so", if the evidence tending to show that it is so or a fact outweighs the evidence which tends to show it is not so or not a fact, then that meets the preponderance of the evidence test. Call up in your mind an old apothocary scale. The old thing, the post and beam and two pans hanging on each side of the beam. A balanced scale. You call it up in your mind and you put evidence on the side of the question on one pan and other on the other, weigh them one against the other. If the scale tips in the favor of the existence of the thing you are trying to find, whether it exists or not, then the preponderance test has been met. If it remains equally balanced or tips the other way the preponderance test has not been met. [Proceedings of January 20, 1982, p. 163]

The Court of Appeals of Maryland affirmed. 297 Md. 432, 468 A.2d 1 (1983).

Petitioner James Arthur Calhoun was charged on May 22, 1981 in the Circuit Court for Montgomery County, Maryland with the first degree murder of Philip Metz, the first degree murder of David Myers, the attempted murder of Douglas Cummins, armed robbery, storehouse breaking, and use of handgun in the commission of a felony. On August 14, 1981, the State filed notice of its intention to seek the penalty of death for the murder of Philip Metz.

Prior to trial, Petitioner moved to strike the notice of intention and to bar the sentence of death, contending in part that the Maryland Capital Punishment Statute was invalid under the Eighth and Fourteenth Amendments in requiring the sentence of death in circumstances where the sentencer might not be convinced that death was appropriate and because the statute placed the burden on the capital defendant to prove by a preponderance of the evidence that mitigating circumstances outweigh aggravating circumstances. After a hearing, the motion was denied. Evidence at trial tended to show that on March 27, 1981, Petitioner and a codefendant broke into a W. Bell & Company store intent upon robbing the manager on his arrival. In response to an alarm, the store's assistant manager, (Cummins), a police officer (Metz), and an employee of the alarm company entered the store and were shot by Petitioner and the codefendant. Cummins, the only one to survive, testified that he and the alarm company employee were shot by the codefendant and that Petitioner fired the shots which killed Officer Metz. The jury convicted Petitioner on all counts.

Petitioner Calhoun elected pursuant to Art. 27, Sec. 413(b)(1) to be sentenced by a jury, which was instructed,[4] as in Tichnell, in accordance with the statute and given the required sentencing form to complete. The jury found beyond a reasonable doubt the existence of three statutory aggravating factors: the victim was a law enforcement officer murdered while in the performance of his duties; the murder was committed in furtherance of an escape from or evasion of the lawful custody of a law enforcement officer; and the murder was committed while committing or attempting to commit robbery. The jury found as "a substantial mitigating factor...the defendant's backgound, which has been such that he has never been integrated into society [and] ... has been and is unable to conform with its norms and moral values." The jury nonetheless did not unanimously find it proven by a preponderance of the evidence that the mitigating circumstance outweighed the aggravating circumstances. The jury accordingly imposed a sentence of death.

An automatic appeal pursuant to Art. 27, Sec. 414, the Court of Appeals affirmed, Calhoun v. State, 297 Md. 563, 468 A.2d. 45 (1983), rejecting Petitioner's Eighth and Fourteenth Amendment challenges.

> [Petitioner] claims the sentencing authority should be entitled to conclude that even if a case is within the literal terms of one or more statutory aggravating circumstances, the death penalty is unwarranted. He further contends that the capital punishment statute is unconstitutional because different fact finders may perceive particular aggravating and mitigating circumstances differently; thus, the determination of whether the death penalty should be imposed rests on "semantic distinctions."
>
> * * *

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[4] [Proceedings of November 6, 1981, pp. 26-32]

> In Tichnell I, 287 Md. 695, we noted that because the Maryland statute allows for consideration of a broad range of mitigating factors, it satisfied the standards established by the Supreme Court in Woodson, 428 U.S. 280, and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325. See Tichnell I, 287 Md. at 720. In Woodson and Roberts (Stanislaus), as well as in Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S. Ct. 1993, 52 L.Ed. 2d 637 (1977), the Supreme Court struck down statutes that required the mandatory imposition of the death penalty for first degree murder. The Court's primary criticism of the North Carolina and Louisiana statutes was that they precluded consideration of the particular traits of the individual defendant and the particular circumstances of the crime for which he was convicted. See Roberts (Harry), 431 U.S. at 637; Roberts (Stanislaus), 428 U.S. at 335-36; Woodson, 428 U.S. at 304-05.
>
> Our statute provides for an individualized determination of the defendant and the crime. This fact alone would appear to insure that the death sentence is not imposed in a mandatory manner. Further, as Chief Judge Murphy noted for the Court in Tichnell III, 297 Md. 432, in the forty-eight cases where the State sought the death penalty it was imposed twenty times, thus negating any mandatory result. Moreover, the sentencing authority may articulate any factor it finds in mitigation. See Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413(g)(8), which states, "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." [Id. at 636-37].

In response to Petitioner's contention that the statute was further deficient in placing the burden on the capital defendant to show by a preponderance of the evidence both the existence of mitigating circumstances and that they outweigh the aggravating circumstances, the Court cited its holding to the contrary in Tichnell v. State, 287 Md. 695, 720-34, 415 A.2d. 830, 843-50 (1983) and "deem[ed] the matter to be settled." Id. at 637-38.

The federal question involved is whether the death sentences imposed in these cases pursuant to Maryland Code (1957, 1982 repl. vol.) Art. 27, Sec. 412 to 414 and the

implementing Maryland Rule 772A are invalid under the Eighth and Fourteenth Amendments to the Constitution of the United States.

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW OF THE DECISIONS BELOW WILL RESOLVE IMPORTANT FEDERAL QUESTIONS, UNSETTLED BY THIS COURT'S PRIOR DECISIONS, AND AFFECTING THE CAPITAL PUNISHMENT STATUTES OF MANY STATES.

In the wake of this Court's death penalty decisions upholding the statutory schemes of several states, a number of authorities have considered the constitutionality of statutes[1] which require a penalty of death in certain circumstances after a weighing of aggravating and mitigating circumstances, without an independent focus upon whether death is the appropriate punishment in the specific case. See, e.g. State v. Dicks, 615 S.W. 2d 126, 130-31 (Tenn.) cert. denied 454 U.S. 933 (1981); Tichnell v. State, 287 Md. 698, 728 415 A.2d 830 (1980); Houston v. State, 593 S.W. 2d 267, 276-77 (Tenn. 1980); State v. McKenzie, 177 Mont. 280, 581 P.2d 1205, 1227-30 (1978) vacated 443 U.S. 903 (1979). Ledewitz, "The Requirement of Death: Mandatory Language in the Pennsylvania Death Penalty Statute," 21 Duq. L. Rev. 103 (1983); see also Smith v. North Carolina, ____ U.S. ____, 74 L.Ed.2d 622 (1982) (Stevens, J., respecting the denial of certiorari). Other authorities have considered whether the Eighth and Fourteenth Amendments require allocation of the burden of proof on the prosecution on the question of whether death is appropriate, and if so

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[1]Ariz. Rev. Stat. Sec. 13-703(e); Cal. Penal Code Sec. 190.3; Colo. Rev. Stat. Sec. 16-11-103; Conn. Gen. Stat. Sec. 53a-46a; Idaho Code Sec. 19-2515(b); Ill. Rev. Stat. Ch. 38, Sec. 9-1; Mont. Rev. Codes Ann. Sec. 46-18-301; N.J. Rev. Stat. Sec. 2C:11-3; Pa. Cons. Stat. Sec. 9711(c); Tenn. Code Ann. Sec. 39-2-203.

what the standard must be.[2] Ford v. Strickland, 696 F.2d. 804, 817-819 (11th Cir.) cert. denied ____ U.S. ____, 78 L.Ed.2d 176 (1983); Tichnell v. State, 287 Md. 695, 729-30, 415 A.2d. 830 (1980); State v. Wood, 648 P.2d 71, 83 (Utah, 1982); Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981); Comment, "Tichnell v. State-Maryland's Death Penalty: The Need for Reform", 42 Md.L.Rev. 875 (1983). See also Smith v. North Carolina, supra, and Lockett v. Ohio, 438 U.S. 586, 609, n.16 (1978) (issue raised but not decided). This Court has passed on neither question.

Those questions come together in this case, for the Maryland Statute, Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413, as implemented by Maryland Rule 772A, not only places the burden on the capital defendant "to convince [the sentencer] that mitigating circumstances outweigh[ ] the aggravating circumstances," Tichnell v. State, 290 Md. 43, 61, 427 A.2d. 991 (1981), but further requires the sentence of death once the bare existence of a statutory aggravating factor is established if the defendant fails to meet his burden of proof and persuasion. The decisions below hold in effect that Maryland may constitutionally require the sentence of death in circumstances where the sentencer is unconvinced that death is the appropriate punishment. Petitioners will contend in this Court that that proposition is at odds with this Court's repeated insistence that State procedures assure "reliability in the determination that death is the appropriate punishment in specific case."

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[2]Statutes so placing the burden, and thus not directly affected by the issue posed in this case, include Ark. Stat. Ann. Sec. 41-1302(1)(beyond a reasonable doubt); Cal. Penal Code Sec. 190.1; N.C. Gen. Stat. Sec. 15-A-2000; Ohio Rev. Code Ann. Sec. 2929.03 (d)(1); Pa. Cons. Stat. Sec. 9711(c); Tex. Code Crim. Pro. Art. 37.071 (beyond a reasonable doubt); Wash. Rev. Code Chapter 10.95.060.

Zant v. Stephens, ____ U.S. ____, 77 L.Ed.2d 235, 255 (1983); Gardner v. Florida, 430 U.S. 349, 363 (1977) (White, J., concurring); Lockett v. Ohio, 428 U.S. 586, (1978), Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The Maryland Statute requires the Court or jury, as the sentencing body, to consider first "whether, beyond a reasonable doubt, any of the [ten enumerated][3] aggravating circumstances exist." Sec. 413(d). Once the existence of at least one aggravating circumstance is found, the sentencing body "shall then consider whether, by a preponderance of the evidence, any of the following mitigating circumstances exist: ..." Sec. 413(g).[4] If no

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[3](1) The victim was a law enforcement officer who was murdered while in the performance of his duties.
(2) The defendant committed the murder at a time when he was confined in any correctional institution.
(3) The defendant committed the murder in furtherance of an excape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.
(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.
(5) The victim was a child abducted in violation of Section 2 of this article.
(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.
(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.
(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.
(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.
(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.

[4](1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the

mitigating circumstance is proven to exist by a preponderance of the evidence, the sentencer enters the word "Death" on the sentencing form. Sec. 413(h)(2); Maryland Rule 772A(d). If mitigating circumstances are found to exist, the court or jury must then "determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances." Sec. 413(h)(1). If the answer is negative, "the sentence shall be death." Sec. 413(h)(2); Maryland Rule 772A(d). The sentencing determination thus made is binding upon the court. Sec. 413(k). The juries in these cases were so instructed.

Maryland law, therefore, differs dramatically from the statutes of the majority of the States which permit the jury or judge to return a life sentence even where no "mitigating circumstances" are found[5] or which place upon

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commission of a felony or another crime of violence.
(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.
(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.
(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.
(5) The youthful age of the defendant at the time of the crime.
(6) The act of the defendant was not the sole proximate cause of the victim's death.
(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.
(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

[5]Ala. Code Secs. 13-11-1 to 9; Del. Code tit. 11, Sec. 4209; Fla. Stat. Annot. Sec. 921.141; Ga. Code Annot. Sec. 27-2302; Ind. Code Ann. Sec. 35-50-2-9; Ky. Rev. Stat. Sec. 532.025 to .075; La. Code Crim. Pro. Ann. Arts. 905-905.9; Mo. Ann. Stat. Secs. 565.006 to .016; Neb. Rev. Stat. Secs. 29-2519 to 2525; Nev. Rev. Stat Sec. 175.552 to 562; N.H. Rev. Stat. Sec. 630.5; N.M. Stat. Secs. 31-18-14, 31-20A-1 to 6; N.C. Gen. Stat. Secs. 15 A-2000 to 2003; Okla. Stat. tit. 21, Secs. 701.10 to .15; S.C. Code Secs. 16-3-20 to 28; S.D. Cod. Laws Secs. 23A-27A-1 to 47; Va. Code Ann. Secs.

the prosecution the ultimate burden of persuasion on the question of life or death,[6] in some instances beyond a reasonable doubt.[7] Indeed, the Maryland Statute requires no independent assessment of whether death is appropriate under all the circumstances , an issue not necessarily resolved by the mechanical parsing of aggravating and mitigating factors. "It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing." Barclay v. Florida, ____ U.S. ____, 77 L.Ed.2d. 1134, 1144 (1983). A jury may be unpersuaded that the crime itself warrants death; it may be unable to articulate those "compassionate ... factors stemming from the diverse frailties of humankind," Woodson, 428 U.S. at 304; because of the applicable standard of proof and its placement, the jury may be uncertain or even guessing as to whether death is the appropriate punishment in the specific case. In Maryland, that jury is nonetheless obliged to impose death unless the rigid formula be satisfied.

Justice Stevens stated the matter succinctly in his opinion respecting the denial of certiorari in Smith v. North Carolina, ____ U.S. ____, 74 L.Ed. 2d. 622 (1982), in which a literal reading of a sentencing instruction was perceived as mandating "two entirely separate inquiries:"

> First, do the aggravating circumstances, considered apart from the mitigating circumstances, warrant the imposition of the death penalty? And second, do the aggravating circumstances outweigh the mitigating factors? It seems to me entirely

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19.2-264.2 to .5; Wyo. Stat. Secs. 6-4-102 to 103.

[6]See Footnote 2, supra.

[7]Ark. Crim. Code, Secs. 41-1301; Miss. Code Ann. Secs. 79-19 (construed in Coleman v. State, 378 So. 2d 640 (Miss. 1979): N.C. Gen. Stat. Sec. 15A-2000(b)(1); Utah Code Secs. 763-206 to 207 (construed in State v. Wood, 648 P.2d 71, 83) (Utah, 1982).

possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of mitigating factors leaves it in doubt as to the proper penalty. But the death penalty can be constitutionally imposed only if the procedure assures reliability in the determination that "death is the appropriate punishment in a specific case." Lockett, supra, 438 U.S., at 601, (plurality opinion), quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

A quotation from a recent opinion by the Utah Supreme Court, which takes a less rigid approach to this issue, will illustrate my point. In State v. Wood, 648 P.2d. 71, 83 (Utah 1982), that court wrote:

"It is our conclusion that the appropriate standard to be followed by the sentencing authority--judge or jury--in a capital case is the following:

> 'After considering the totality of the aggravating and mitigating circumstances, you must be persuaded beyond a reasonable doubt that total aggravation outweighs total mitigation, and you must further be persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances.'

These standards require that the sentencing body compare the totality of the mitigating against the totality of the aggravating factors. Not in terms of the relative numbers of the aggravating and the mitigating factors, but in terms of their respective substantiality and persuasiveness. Basically, what the sentencing authority must decide is how compelling or persuasive the totality of the mitigating factors are when compared against the totality of the aggravating factors. The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances." (Emphasis added) [Id. at 622][8]

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[8]The apparent reasons for denying certiorari in Smith are not present here. Unlike the instruction at issue in Smith, which could be interpreted unobjectionably, there is nothing ambiguous about the Maryland law. It requires the very analysis found questionable by Justice Stevens, and on its

In perhaps no other area of the law has the need for reliability in the decisional process been stressed as it has been in the capital punishment context. In other areas where this Court has perceived a need to minimize the risk of error in the adjudicatory process, it has not hesitated to place a heightened standard of proof upon the party seeking to change the status quo. See, e.g. Santosky v. Kramer, 455 U.S. 745 (1982); Addington v. Texas, 441 U.S. (1979); In Re: Winship, 397 U.S. 358 (1970). The Maryland scheme, however, permits the capital sentencing decision to be made on the basis of the "preponderance of evidence standard", which "by its very terms demand[s] consideration of the quantity, rather than the quality of evidence," Santosky, 455 U.S. at 764, and "is quite consistent with want of belief," Trickett, "Preponderance of Evidence and Reasonable Doubt," 10 Dick.L.Rev. 76 (1906). Moreover, it places the ultimate burden of both production and persuasion on the capital defendant, who must be executed if he fails in that regard.[9]

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face it forecloses the "slight changes in the form of ... instructions" which were suggested in Smith. Id. at 623. Postconviction proceedings will in no way develop the issues here posed.

[9]Thus if, not improbably, the sentencer finds the evidence to be equally balanced ---- i.e. simply does not know whether mitigating circumstances outweigh aggravating circumstances ---- it must impose death. The fact that the defendant must succeed in meeting two separate burdens (showing the existence of the factors and then that they outweigh aggravation, both by a preponderance) clearly exacerbates the problem. If one defines preponderance of the evidence as, for example, representing 51 percent likelihood of correctness, then the likelihood that two successive decisions made on the basis of preponderance of the evidence would be correct is equal to .51 multiplied by .51 or 26.01%: i.e., it is more likely than not that under these conditions the overall decision is incorrect. See M. Moroney, Facts from Figures 8-11 (Repr. 1976).

CONCLUSION

Resolution of the question presented in this case will settle an important question left unanswered by this Court's prior decisions. The decisions below offer the fullest appellate treatment of the issue posed, and review of those decisions will give direction to the courts of those States having provisions similar to Maryland's. A decision by this Court in these cases will explain, as no prior decision has explained, the meaning of this Court's oft-stated commitment to the "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson, 428 U.S. at 305.

Respectfully submitted,

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Of Counsel:

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Misc. No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 1984, copies of the Petition for Writ of Certiorari were delivered to the Office of the Attorney General, Deborah K. Chasanow, Assistant Attorney General, 7 North Calvert Street, The Munsey Building, 4th Floor, Baltimore, Maryland 21202.

GEORGE E. BURNS, JR.
Assistant Public Defender
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioners

Misc. No.

IN THE

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STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

NOTICE OF APPEARANCE

MR. CLERK:

Please enter my appearance as counsel for Petitioners in the above captioned case.

GEORGE E. BURNS, JR.
Assistant Public Defender
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioners

Misc. No.

IN THE

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v.

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Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioners, Richard Danny Tichnell and James Arthur Calhoun, who are indigent and who have been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, ask leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioners' affidavits in support of this Petition are attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioners

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL
and
JAMES ARTHUR CALHOUN,
Petitioners

v.

STATE OF MARYLAND,
Respondent

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Richard Danny Tichnell, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed: No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

7/or 78 $5,000.00 per yr.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No!

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No!

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No!

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Mr. Richard Danny Tichnell

RICHARD DANNY TICHNELL

Subscribed and sworn to before me, a Notary Public, this 22 day of February, 1984.

Charles R Simonsen
NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE

Misc. No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL,
and
JAMES ARTHUR CALHOUN,
Petitioners

v.

STATE OF MARYLAND,
Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, James Arthur Calhoun, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed: _____

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

_____

_____

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

_____

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? _____

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

_____

_____

_____

3. Do you own any cash or checking or savings account? _____

(a) If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? _____

(a) If the answer is yes, describe the property and state its approximate value.

_____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. _____

_____

_____

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

_____
JAMES ARTHUR CALHOUN

Subscribed and sworn to before me, a Notary Public, this _____ day of _____, 1984.

_____
NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

_____
JUSTICE

ORIGINAL

Misc. No. 83-6346

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

RECEIVED
MAR 1 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioners, Richard Danny Tichnell and James Arthur Calhoun, who are indigent and who have been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, ask leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioners' affidavits in support of this Petition are attached hereto.

GEORGE E. BURNS, JR.
Assistant Public Defender
222 East Baltimore Street
Baltimore, Maryland 21202
(301)659-4842

Counsel for Petitioners

ORIGINAL

Misc. No. 83-6346

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TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Richard Danny Tichnell, being first duly sworn, depose and say that I am the Respondent, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed: No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Nov 78 $15,000.00 per yr.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? No

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to my questions in this affidavit will subject me to penalties for perjury.

Mr. Richard Danny Tichnell

RICHARD DANNY TICHNELL

Subscribed and sworn to before me, a Notary Public, this 22 day of February, 1984.

Charles R. Simonsen
NOTARY PUBLIC

My Commission Expires: 7/1/86

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

JUSTICE